

No. 87-1521

Supreme Court, U.S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

DANIEL J. MAHONEY, JR.,
Executor of the Estate of James M. Cox, Jr.,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

**On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit**

**JOINT BRIEF OF AMICI CURIAE STATE OF OHIO
AND JAMES M. COX, JR. FOUNDATION, INC.
IN SUPPORT OF PETITION**

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THE INTERESTS OF AMICI CURIAE ¹

The consequences of this case extend far beyond its immediate parties. The Sixth Circuit's ruling has a significant adverse effect on the citizens of the State of Ohio and the James M. Cox, Jr. Foundation, Inc. ("Foundation"), an Ohio charitable trust Decedent established in 1969. As a result of language in the Sixth Circuit's opinion holding that stock "transferred" to the James M. Cox, Jr. Trust ("Trust") "must be included" in the gross estate of James M. Cox, Jr. ("Decedent"), the funding for the Foundation could be eliminated, prevent-

¹ Written consents as required by Rule 36 of the Supreme Court Rules for the filing of this brief were obtained and are on file in the Clerk's office. The decision below is reported at 831 F.2d 641.

ing the citizens of Ohio from receiving the benefits which they otherwise would receive.

The Sixth Circuit ruled that the value of certain stock placed in the Trust by former Governor of Ohio James M. Cox, Sr. ("Governor") for the benefit of Decedent must be included in Decedent's gross estate under Section 2036(a) of the Internal Revenue Code of 1954. There is an exception in the statute, however, for transfers that are exchanges for "an adequate and full consideration." Because the district court had not ruled on, and the Sixth Circuit had not addressed, whether the statutory exception applied to the transaction, the James M. Cox, Jr. Estate ("Estate") filed a motion in the Sixth Circuit seeking clarification of the statement in the court's opinion that the stock "must be included" in Decedent's estate. The State of Ohio filed an *amicus curiae* brief in the Sixth Circuit supporting the Estate's motion, arguing "that the Estate [should] have its 'day in court' on remand, on the question of whether the [exception] applies to its case."² However, the Sixth Circuit denied the Estate's motion without explanation.

The Sixth Circuit's ruling in this case could cause a significant reduction and perhaps elimination of funding for the Foundation.³ If allowed to stand, the ruling

² The State of Ohio requires its Attorney General to oversee charitable trusts benefitting Ohio citizens. The Attorney General of Ohio is authorized by Ohio Revised Statute Section 109.25 to "intervene in any judicial proceeding affecting a charitable trust when he determines that the public interest should be protected in such proceeding."

³ The Foundation currently has approximately \$6,000,000 in assets, virtually all coming from a single distribution from the Estate. This distribution was permitted by Decedent's spouse subject to certain conditions, including (1) that disbursements from the Foundation be limited to income on the principal, and (2) that the distribution be returned to the Estate to the extent there is a final judicial determination that the Foundation is not entitled to it.

will increase Decedent's taxable gross estate, and consequently the Estate's tax liability. Substantially all of this liability, asserted by the Internal Revenue Service to be approximately \$6,900,000, would be borne by the portion of Decedent's estate that funds the Foundation.⁴ Therefore, the citizens of the State of Ohio would be deprived of the benefits provided by the Foundation. In addition, as a result of the ruling below, taxpayers in the Sixth Circuit would be treated differently from taxpayers elsewhere.

SUMMARY OF ARGUMENT

The Sixth Circuit ignored established rules of judicial procedure in reversing without remanding the case to the district court for consideration of the Section 2036(a) exception issue. The Sixth Circuit's failure to remand denies the parties the opportunity to be heard on the applicability of the exception in light of the Sixth Circuit's ruling that Decedent "transferred" stock to the Trust. The Sixth Circuit improperly usurped the district court's fact-finding role.

Further, this Court's decision in *United States v. Estate of Grace*, 395 U.S. 316 (1969), established that a transaction involving several constituent parts must be

³ [Continued]

The Foundation has disbursed over \$300,000 to charities in Ohio since its creation.

⁴ Decedent's Last Will and Testament provides that half his adjusted gross estate shall go to his surviving spouse and that the residue, after all estate, inheritance, transfer and similar taxes are paid, shall go to the Foundation. The Will does not contemplate the possibility that a portion of the Trust would be includable in Decedent's gross estate.

Moreover, Decedent's surviving spouse has taken the position that if the value of 11.3136 percent of the stock is included in Decedent's gross estate, she is entitled to an enhanced interest because her bequest is for one half of Decedent's adjusted gross estate. If this position prevails, the funds to be distributed to the Foundation could be further reduced or eliminated.

considered in its entirety to determine its ultimate economic impact for purposes of federal estate taxation. Numerous circuit courts have applied this basic principle to the exception in Section 2036(a) to determine whether "an adequate and full consideration" was received in exchange for a transfer to trust with a retained life interest. The ruling of the Sixth Circuit in this case conflicts with this principle by treating the transaction among the Governor, Decedent and the Trust as several separate transactions for purposes of applying the statutory exception. This Court should address the Sixth Circuit's failure to follow the decision in *Estate of Grace*.

The Sixth Circuit's ruling also creates a conflict among the circuits regarding the applicability of the statutory exception to integrated transactions. This conflict places taxpayers in the Sixth Circuit on a footing different from taxpayers in other circuits, resulting in a lack of uniformity and the unfair treatment of taxpayers in Ohio and other states. Moreover, the conflict creates inefficiency in the administration of federal estate taxation.

ARGUMENT

I. The Sixth Circuit's Reversal Without Remanding on the Exception Issue Substantially Departs From Settled Judicial Procedure and Requires Review by This Court.

The Sixth Circuit's reversal without remanding the case for district court consideration of the applicability of the statutory exception substantially departs from settled judicial procedure. The district court did not reach or pass upon whether the exception applies to the transaction among the Governor, Decedent and the Trust. Indeed, it was unnecessary for the district court to address the exception until the Sixth Circuit held that Decedent must be deemed to have "transferred" stock to the Trust.

It is well settled that an appellate court ordinarily cannot base a reversal on a theory not relied upon in

the lower court. See, e.g., *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 498 (1937); *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1333-34 (7th Cir.), cert. denied, 434 U.S. 975 (1977). Instead, the appellate court should remand the case to the district court for consideration of any issue arising as a result of the appellate court's ruling. See *Guste v. Jackson*, 429 U.S. 399, 399-400 (1977) (per curiam); *Jimenez v. Weinberger*, 417 U.S. 628, 637-38 (1974); *United States v. Shelby Iron Co. of New Jersey*, 273 U.S. 571, 581-82 (1927); *Commissioner v. Estate of Nelson*, 396 F.2d 519, 524 (2d Cir. 1968).

The proper procedure is illustrated by the decision of the Second Circuit Court of Appeals in *Estate of Nelson*, 396 F.2d 519. The decedent in that case had established a trust to provide marital support for his wife pursuant to a divorce settlement. *Id.* at 521. The parties disagreed as to whether the value of the support rights relinquished by the wife was at least equal to the value of the property transferred to the trust by the decedent. The Tax Court fragmented the trust interests and concluded that the value of the support rights was full consideration for only a portion of those interests. *Id.* at 522-23. On appeal, the Second Circuit rejected this approach. *Id.* at 523-24. The court stated that if the value of the support rights were equal to or exceeded the value of the trust corpus as a whole, then full consideration was received. Rather than make that determination itself, however, the Second Circuit remanded the case for the lower court to ascertain the value of the support rights. *Id.*

As in *Estate of Nelson*, the Sixth Circuit here should have remanded the case to the district court for a determination of whether the value of the property Decedent received in the exchange with the Governor was equal to or exceeded the value of the property he is

deemed to have transferred. The impact of the Sixth Circuit's decision is to foreclose the parties' opportunity to be heard on the exception issue on remand.

Moreover, the citizens of Ohio have a substantial interest in uniform federal procedures and, in particular, in being treated in accordance with such rules once established. The Sixth Circuit's failure to follow established appellate procedures in this case, when citizens in other circuits have the benefit of such procedures, is antithetical to our federal system and calls for remedial action by this Court.

II. The Sixth Circuit's Decision Conflicts in Principle With This Court's Decision in *Estate of Grace* and With Other Circuits, Undermining the Uniform and Fair Administration of Federal Estate Taxation.

In *Estate of Grace*, this Court held that a transaction must be considered as a whole to determine its overall economic effect for purposes of federal estate taxation. 395 U.S. at 325; *see also Helvering v. Le Gierse*, 312 U.S. 531, 540 (1941). Several other circuit courts have correctly applied the principle in *Estate of Grace* to integrated transactions involving trusts to determine the applicability of the exception in Section 2036(a). These courts recognize that the exception may apply to such a transaction, depending on the overall effect of the entire transaction on the value of the decedent's estate. *See, e.g., Estate of Christ v. Commissioner*, 480 F.2d 171 (9th Cir. 1973); *In re Estate of Davis*, 440 F.2d 896 (3d Cir. 1971); *United States v. Gordon*, 406 F.2d 332 (5th Cir. 1969).

The Sixth Circuit's decision in this case, however, ignores the analysis required by *Estate of Grace* and followed by other circuits under Section 2036(a), thereby creating a conflict among the circuits in this area of

federal estate taxation.⁵ As this Court has recognized on numerous occasions, it is important to resolve conflicts on issues of federal estate taxation. See, e.g., *United States v. Cartwright*, 411 U.S. 546, 550 (1973); *United States v. O'Malley*, 383 U.S. 627, 630 (1966); *Jackson v. United States*, 376 U.S. 503, 505 (1964); *Meyer v. United States*, 364 U.S. 410, 411 (1960).

The practical effect of the conflict will be that the estate tax treatment of taxpayers in the Sixth Circuit will differ from that accorded taxpayers in other circuits. Whenever a decedent has transferred property as part of an integrated transaction in Ohio, Michigan, Tennessee or Kentucky, the transferred property will be included in the decedent's estate under the Sixth Circuit's decision in this case, even when the value of the property received by the decedent as part of the exchange equals or exceeds the value of the property transferred. Such transferred property would not be included in a decedent's estate if the decedent were a resident of any other state. Moreover, only estates in the Sixth Circuit will be subject to double taxation—the transferred property will be taxed under Section 2036(a), and the property received will be taxed as part of the estates' assets. It is important for the fair, efficient and uniform administration of federal tax laws that this inequity be addressed by the Supreme Court. See *Ivan Allen Co. v. United States*, 422 U.S. 617, 623-24 (1975); *United States v. Donruss Co.*, 393 U.S. 297, 299 (1969); *Commissioner v. Bilder*, 369 U.S. 499, 501 (1962).⁶

⁵ Although the Sixth Circuit relied on *Estate of Grace* in ruling that extrinsic and subjective evidence cannot be utilized to reconstruct the terms of a trust, 831 F.2d at 641-42, the court ignored the principle also set forth in that case that interrelated parts of a transaction must be considered together. See 395 U.S. at 325; see also *Le Gierse*, 312 U.S. at 540.

⁶ Similarly, important technical issues affecting the efficient and uniform administration and enforcement of federal tax laws have been addressed and resolved by the Supreme Court. See, e.g., *Donaldson v. United States*, 400 U.S. 517, 522 (1971) (interest of

Further, this Court has indicated that the potentially recurring nature of a conflict in the administration of tax laws is a significant reason for resolution of the issue in the Supreme Court. *Bruning v. United States*, 376 U.S. 358, 359-60 (1964) (certiorari granted partly because of potentially recurring nature of question as to recoverability of post-bankruptcy interest on tax assessment); *see also United States v. Gilmore*, 372 U.S. 39, 40-41 (1963) ("continuing importance" of question regarding deductibility of legal expense in divorce action). The conflict created by the Sixth Circuit in this case will continue under the Tax Reform Act of 1986, which retains Section 2036(a) and its exception for transactions for "an adequate and full consideration." *See* 26 U.S.C. § 2036(a). Thus, it is essential that this issue be resolved in the Supreme Court.

taxpayer in proceedings to enforce internal revenue summons); *United States v. Union Central Life Ins. Co.*, 368 U.S. 291, 293 (1961) (income tax filing requirements); *United States v. Brosnan*, 363 U.S. 237, 240 (1960) (whether state proceedings extinguished federal tax lien); *Colony, Inc. v. Commissioner*, 357 U.S. 28, 31-32 (1958) (proper scope of statute of limitations for income tax reporting).

CONCLUSION

For the reasons set forth above, the State of Ohio and the Foundation respectfully request that the Estate's Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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